STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

PATRICIA MYRA CORLEY,

Plaintiff-Appellee,

v

DETROIT BOARD OF EDUCATION, JOSEPH SMITH, and BARBARA FINCH, Jointly and Severally,

Defendants-Appellants.

S.C. No. 119773
C.A. No. 218528
L.C. No. 97-704241 CZ

119773 ✓

PLAINTIFF-APPELLEE'S BRIEF IN RESPONSE TO THE COURT'S ORDER OF JANUARY 16, 2004

PROOF OF SERVICE

ERNEST L. JARRETT, P.C.

By: ERNEST L. JARRETT (P29770)
Attorney for Plaintiff-Appellee
2100 Cadillac Tower Building
Detroit, Michigan 48226
(313) 964-2002

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A.

WHETHER THE COURT OF APPEALS ERRED BY HOLDING THAT PLAINTIFF COULD PURSUE HER CLAIMS OF QUID PRO QUO SEXUAL HARASSMENT AND/OR HOSTILE WORK ENVIRONMENT.

I. STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Plaintiff, Patricia Myra Corley, was employed by the Detroit Board of Education as a full-time counselor at Cass Technical High School. Following her divorce in 1991, she took an additional part-time counseling position at the Golightly Vocational Center, adult education evening school program. Defendant Joseph Smith interviewed and hired the Plaintiff for the Golightly position. Plaintiff began working at Golightly in the fall of 1991.

Soon after she began her part-time employment, Plaintiff accepted Defendant Smith's invitation to dinner. Following a few more casual dates, Corley and Smith began a romantic/sexual relationship. The relationship would last nearly four years until it was terminated by Smith in 1995 in order to free himself to pursue a new relationship with the Defendant Barbara Finch, an administrator in the Golightly day school.

The facts as recited above are not in dispute.

It is equally undisputed that despite having been jilted by her paramour, the Plaintiff did nothing to challenge Smith's decision to end their relationship of nearly four years or to attempt to disrupt his new one. Of equal, if not greater importance, plaintiff's job performance did nor suffer following her break-up with Smith.

Notwithstanding her dignified acceptance of the loss of her romantic interest, Defendant Smith repeatedly threatened the Plaintiff with termination of her employment if she did anything to "mess up" his new relationship with Finch. Despite Plaintiff's assurance s that she had no intention of interfering with Smith's new relationship with Finch, these threats persisted throughout the school year.

By 1996, Smith and Finch decided to marry and with this decision their harassment of the Plaintiff escalated. Finch, an administrator in the day school, whose work day ended hours

before the arrival of the night school staff, began staying late for no apparent reason other than to harass and intimidate the Plaintiff. She made frequent trips to the work area of the night school counselors, which was not near her own office, to make snide and offensive comments aimed at humiliating the Plaintiff. Though ostensibly speaking to others she frequently engaged in conversations which she intended for the Plaintiff to hear, which taunted the Plaintiff and flaunted her relationship with Smith.

In further escalation of their harassment of the Plaintiff, Finch and Smith combined to require the Plaintiff to work at an "assigned" work station, which had never before been required and which no other counselor was required to do. Her new "assigned" work station was isolated in relationship to other night-school counselors and was demeaning in that it was so cramped and confining that it was little more than a dimly lit closet. Coincidentally, this new "assigned" work station was located in close proximity to Finch's office, and Plaintiff could neither enter nor leave her area without encountering her. When despite this demeaning treatment, Plaintiff did not resign her employment, she was terminated by Smith, without explanation following the 1995-1996 school year. Plaintiff was the only night-school counselor not to continue in that capacity the following year.

Plaintiff filed suit under the Elliot-Larsen Civil Rights Act (CRA), MCL 37.2101 et seq, alleging, inter alia, that she was subjected to a hostile work environment, sexual harassment, disparate treatment and unlawful termination because of her sex and prior romantic/sexual relationship with the Defendant Smith.

The trial court eventually granted summary disposition on all of Plaintiff's claims, whereupon Plaintiff timely took an appeal of right.

In a published opinion dated May 15, 2001, the Court of Appeals affirmed the trial

court's rulings with respect to Plaintiff's claims for breach of contract, intentional infliction of emotional distress and Plaintiff's civil rights claim of discrimination based on her marital status. However, the Court of Appeals reversed the trial court with respect to Plaintiff's remaining civil rights claims.

Following the denial of their motion for rehearing, the Defendants filed their application for leave to appeal with this Court.

By order entered on November 19, 2002, this Court held the application for leave to appeal in abeyance pending its decision in Haynie v State of Michigan, 468 Mich 302 (2003).

By order entered on January 16, 2004, this Court directed the Clerk of this Court to schedule oral argument on whether to grant the Defendants' application or take other action permitted by MCR 7.302 (G)(1). The Court instructed the parties to include among the issues to be addressed whether Plaintiff ordered sufficient evidence that she was subjected to "conduct or communications of a sexual nature" within the meaning of MCL 37.2103 (i) to avoid summary disposition. Finally the Court permitted the parties to file supplemental briefs withing 28 days fo the order.

For reasons set forth the motion which this brief accompanies, the Plaintiff did not file her brief within 28 days fo the Court's order. This brief is tendered by the Plaintiff-Appellee, who prays that the Court will find excusable neglect in its untimely filing, and will permit its filing and consider its substance.

II. ARGUMENT

By holding the Defendant's Application for Leave to Appeal in abeyance pending the Court's decision in Haynie v Department of State Police, 468 Mich 302 (2003), this Court signaled that, at least preliminarily, it found similarities between the two cases, such that its

disposition in Haynie might be controlling in the instant case. The Court's January 16, 2004 order further indicated that the Court continues in this preliminary belief to the extent that he parties now have the opportunity to argue why the holding in Haynie, supra does or does not apply to the facts in the instant case.

Although the Plaintiff will argue below that the facts in the instant case are distinguisable from those in Haynie, supra, and thus Haynie does not apply, it is important to note at the outset that unlike in Haynie, the Plaintiff in the instant case does not exclusively allege sexual harassment under MCL 37.2103 (i). To the contrary, Plaintiff also alleged gender based discrimination. Thus, regardless of the eventual holding with respect to the Plaintiff's sexual harassment claim, the Plaintiff's gender based claim should nevertheless be remanded to the trial court for trial.

A.

WHETHER THE COURT OF APPEALS ERRED BY HOLDING THAT PLAINTIFF COULD PURSUE HER CLAIMS OF QUID PRO QUO SEXUAL HARASSMENT AND/OR HOSTILE WORK ENVIRONMENT

In Haynie v Department of State Police, 468 Mich 302 (2003), this Court held that gender based harassment that was not at all "sexual" in nature is insufficient to establish a claim for sexual harassment under MCL 37.2103 (i).

In Haynie, supra, two capitol security officers, one male and one female, shot and killed each other while on duty. The personal representative of the estate of the female officer filed suit under the CRA against the State of Michigan and the Michigan Department of State Police. The Plaintiff claimed that her decedent had been sexually harassed by the male officer who had made repeated hostile and offensive comments about her gender, thus creating a hostile work environment.

The defendants filed their motion for summary disposition contending that the alleged conduct of the male officer was not "sexual in nature" and therefore not sufficient to establish a claim of sexual harassment. The Court of Appeals reversed this decision and the Supreme Court granted leave to appeal to consider the issue.

After concluding that it was undisputed that the offensive comments were not "sexual in nature", the Court interpreted MCL 37.2103 (i) to require conduct or communication that is sexual in nature in order to be actionable under that article of the CRA. The Court reversed the Court of Appeals and reinstated the trial court's grant of summary disposition.

In Haynie, supra, it appears that the motivation underlying the alleged gender-based

harassment was the male security officer's belief that women were not suitable to work as police officers. Apparently believing that police work was not a place for women, the alleged harassment focused upon the plaintiff's decedent's sex or gender, without having any nexus to any sexual issues. Indeed, the Court began its analysis by noting that the plaintiff in that action had conceded that the offensive comments and/or conduct were not sexual in nature.

With a concession from the plaintiff in Haynie, supra, that he alleged offensive comments and/or conduct were not "sexual in nature", the Court was left only to decide whether gender-based harassment which is devoid of "sexual" nexus is actionable under MCL 37.2103(i) as "sexual harassment".

In concluding that non-sexual conduct or communications was not sufficient to make out a claim for sexual harassment, the Court was not required to define "verbal or physical conduct or communication of a "sexual nature" as that phrase is used in MCL 37.2103 (i). Given the concession by the plaintiff in Haynie, supra, that the offensive conduct or comments were not sexual in nature, the Court was able to decide that the conduct or communication alleged in that action was not sexual harassment without the necessity of defining what constituted "conduct or communications of a sexual nature" within the meaning of that phrase in the CRA.

Given that the phrase was not defined by the Court in Haynie, supra, the defendants in the instant case have seized upon the opportunity to fill that void by urging upon this Court a definition of their own. However, when scrutinized closely it is clear that the definition urged by the defendant is a product of their own self-serving imagination. They urge that "conduct or communication of sexual nature" means that actionable conduct or communication under MCL 37.2103 (i) must be "overtly sexual", it appears that they are referring to crass or boorish statements or actions which refer to suggest sex acts or are otherwise sexually suggestive. Such

a definition, however, would seem to be at odds with the liberal construction of the CRA which this Court in Eide v Kelsey-Hayes Co., 431 Mich 26 (1988) stated it must be accorded.

In its opinion which reversed the trial court and from which the Defendants now seek leave to appeal, the Court of Appeals correctly found that the conduct of Smith and Finch was rooted in and emanated from the romantic/sexual relationship between the Plaintiff and Smith, and the Defendant's apparent belief that the Plaintiff's mere presence threatened their own romantic/sexual relationship, irrational though that belief was. Thus, the threats, taunting, adverse employment actions and eventual discharge of the Plaintiff all stem exclusively from the fact that the Plaintiff once enjoyed a romantic/sexual relationship with the Defendant Smith, and that because of that fact a paranoid Smith believed that his new romantic/sexual relationship was threatened by the Plaintiff's presence.

Given that the motivation of the Defendants to speak and act as they did with respect to the Plaintiff was rooted exclusively in the romantic/sexual future between Smith and Finch, the harassment of the Plaintiff was "sexual in nature" as it was motivated solely by sexual considerations. Thus, Plaintiff submits that factually she satisfies the requirements for staking claim of sexual harassment.

Similarly, the hostile work environment which the Defendants combined to create was rooted in the Defendants irrational need to protect their own romantic/sexual relationship, thus having an additional sexual nexus.

In this respect, Plaintiff submits that the instant case is clearly distinguishable from the facts in Haynie. In Haynie supra, the offensive conduct was not motivated by any sexual considerations and had no other nexus to anything "sexual". In the case at bar, it was past "sexual" relationship between the Plaintiff and Smith combined with an irrational belief that their

present "sexual" relationship was threatened by the Plaintiff's presence which motivated the defendants to eradicate the Plaintiff from the workplace at all costs. As the past and present romantic/sexual relationships juxtaposed against one another was the moving force behind their words and deeds, their conduct and communication was clearly of a sexual nature.

Defendant's reliance upon Succar v Dade County School Board, 229 F3d 1343 (11th Cir 2000) is misplaced. In that case, the federal court found no actionable discriminatory conduct by the plaintiff's former adulterous lover, when her conduct was motivated exclusively by her anger over how their relationship had acrimoniously ended.

In the case at bar, the Defendants' conduct resulted not from an acrimonious ending in the relationship, but rather only from the paranoia of the Defendants because of the immutable historical fact of the prior romantic/sexual relationship between the Plaintiff and Smith, and a phobic belief that their own romantic/sexual relationship was threatened by her presence.

III. CONCLUSION

Because the Court of Appeals correctly found the sexual nexus between the Defendants's conduct and communication with respect to the Plaintiff, its holding in this matter should not be disturbed. Accordingly, Plaintiff submits that the Application for Leave to Appeal should be denied.

Respectfully submitted,

By Ernest L. Jarrett

ERNEST L. JARRETT (P29770)
Attorney for Plaintiff-Appellee
2100 Cadillac Tower Building
Detroit, MI 48226
(313) 964-2002

Dated: April 20, 2004

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PROOF OF SERVICE

The undersigned being first duly sworn, deposes and says that a copy of Plaintiff-Appellee's Brief in Response to the Court's Order of January 16, 2004 was served upon the following attorneys of record:

Christine D. Oldani
Kenneth L. Lewis
535 Griswold Street, Ste. 2400
Detroit, Michigan 48226-3260

by hand-delivery on the 20th of April, 2004, to the address indicated above.

RACHEL D. JARRETT